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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

URIAH FRANK COURTNEY,

Defendant and Appellant.

D051311

(Super. Ct. Nos. SCD189717,
SCD183731, SCD182764)

APPEAL from a judgment of the Superior Court of San Diego County, Robert F. O'Neill, Judge. Affirmed in part, reversed in part.

A jury convicted Uriah Frank Courtney of kidnap for sexual penetration (Pen. Code, §§ 209, subd. (b)(1), 289), rape by foreign object with the use of force (*id.*, § 289, subd. (a)(1)), and false imprisonment by violence (*id.*, §§ 236, 237, subd. (a)). In separate proceedings, Courtney pleaded guilty to possession of more than \$100,000 in

proceeds from drug sales in exchange for the dismissal of two other related charges.¹ (Health & Saf. Code, § 11370.6, subd. (a)). The trial court sentenced Courtney to a term of life in prison with the possibility of parole for the kidnapping for sexual penetration conviction, plus three years for the possession of drug proceeds conviction. The trial court sentenced Courtney to six years in prison for the rape by foreign object conviction and two years in prison for the false imprisonment by violence conviction, but stayed imposition of the sentences for these two convictions under Penal Code, section 654.²

Courtney appeals, arguing there is insufficient evidence to support the asportation element of kidnapping for sexual penetration. Alternatively, Courtney argues the trial court should have stricken the false imprisonment by violence conviction because false imprisonment by violence is a lesser included offense of kidnapping for sexual penetration. We agree with Courtney's latter argument and reverse the judgment as to the conviction for false imprisonment by violence. We affirm the judgment in all other respects.

FACTUAL BACKGROUND

Sixteen-year-old Erika J. was walking along a road near a freeway when a truck

¹ Law enforcement officers discovered the drug proceeds in one of Courtney's storage lockers when they were investigating him for the crimes against Erika. The trial court granted a motion by Courtney to sever this charge and two other related charges from the charges involving the attack on Erika.

² On the same day, the trial court also sentenced Courtney for two probation violation cases. His total sentence for all three cases was life with the possibility of parole plus eight years and eight months in prison.

turned in front of her and blocked her path. The driver, Courtney, stopped and stared at her. She stopped and waited briefly for the truck to move. When it did not, she walked around it and continued to the stoplight at the corner.

While Erika waited for the light to change, Courtney drove up behind her and stopped at the corner. He leaned over the passenger seat and stared at her again. When the light changed, Courtney turned right and Erika crossed the street. She continued along the road and under the freeway overpass.

As she was walking up the hill from the overpass, Courtney grabbed her from behind and told her not to scream. He then pulled her skirt up to her hips, grabbed her crotch area and ripped her panties. Erika screamed and fought Courtney, hitting him with a portable CD player she had in her hand. During the struggle, her feet were on and off the ground and she lost one of her flip-flop sandals. She broke free and abandoned her other flip-flop sandal to make it easier to run. She ran up the hill, then circled around and ran down the middle of the street, hoping a car would come. However, there was not much traffic and no cars were in the area then.

Courtney ran after her and caught her. He grabbed her from behind, lifted her off her feet, and threw her into some bushes near a stop sign on the opposite side of the street from where they first struggled. She landed on her back on bushes, rocks, and twigs. Her skirt was at her stomach and her panties were hanging on by one side. She kept fighting and screaming, hoping someone would hear her, but still no cars passed by. Courtney threatened her and told her to stop screaming. He got on top of her and inserted at least one finger into her vagina. She stopped screaming, but then she saw a car going

up the hill on the other side of the street and she started screaming again. The car slowed, but did not stop. She saw another car going down the hill on the side of the street where she and Courtney were. She fought harder, broke free, ran down the hill to the car, which had pulled over. She beat on the car window and pulled on the door handle, asking the driver to please let her in. The driver, Catherine Yarbrough, let her in.

After Erika got into Yarbrough's car, Courtney, who had been running after her, stopped, turned around, and ran up the hill. He picked up a hat, which he had dropped, and Erika's CD player, which she had dropped. He threw out the CD inside the CD player and ran down the hill past Yarbrough's car. Yarbrough followed Courtney until she lost sight of him and then took Erika home.

Angel Rivera drove down the hill after and in the same direction as Yarbrough. He saw Erika and Courtney struggling in the bushes below and saw Courtney trying to pull Erika's skirt up. Seconds later, he saw Yarbrough's car pull over and Erika, who was crying and distressed, come out of the bushes and get into it. He then saw Courtney run away.

During the attack, Erika suffered scratches on her arms, leg, back and buttocks from the bushes. In addition, she had abrasions on her left knee and the right side of her groin. She also had a bruised hymen and other genital injuries. A forensic pediatrician found Erika's injuries to be consistent with Erika's description of what had happened to her.

Courtney did not dispute that the crimes occurred in the manner described by Erika. Instead, he presented mistaken identification and alibi defenses.

DISCUSSION

I

Substantial Evidence Supports the Asportation Element of the Aggravated Kidnapping Charge

Courtney contends there is insufficient evidence to support the asportation element of the aggravated kidnapping charge. We disagree.

When considering a defendant's challenge to the sufficiency of the evidence, we review the entire record most favorably to the judgment to determine whether the record contains substantial evidence from which a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. We do not reweigh evidence or reassess a witness's credibility and we presume the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

The asportation element of aggravated kidnapping requires movement of the victim that: (1) is more than merely incidental to the underlying crime, and (2) increases the risk of physical or psychological harm to the victim beyond that inherent in the underlying crime. (Pen. Code, § 209, subd. (b)(2); *People v. Nguyen* (2000) 22 Cal.4th 872, 885-886; *People v. Martinez* (1999) 20 Cal.4th 225, 232; *People v. Shadden* (2001) 93 Cal.App.4th 164, 168.) To determine whether the movement was merely incidental to the underlying crime, the trier of fact must consider the nature and scope of the movement, including the actual distance the victim is moved as well as the environmental context in which the movement occurred. (*People v. Rayford* (1994) 9 Cal.4th 1, 12-13;

People v. Power (2008) 159 Cal.App.4th 126, 137-138; *People v. Shadden*, *supra*, at p. 168.) No minimum distance is required as long as the movement is substantial. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1152; *People v. Rayford*, *supra*, at pp. 12, 23.) Moreover, if the movement changes the victim's environment, it does not have to be a great distance to be substantial. (*People v. Shadden*, *supra*, at p. 169; see e.g., *People v. Smith* (1995) 33 Cal.App.4th 1586, 1593-1594.)

To determine whether the movement increased the risk of harm to the victim, the trier of fact must consider such factors as whether the movement decreased the likelihood of the crime's detection, increased the inherent danger of a victim's foreseeable attempts to escape, or enhanced the perpetrator's opportunity to commit additional crimes. (*People v. Rayford*, *supra*, 9 Cal.4th at pp. 12-13; *People v. Power*, *supra*, 159 Cal.App.4th at pp. 137-138; *People v. Shadden*, *supra*, 93 Cal.App.4th at p. 168.) Both asportation requirements are necessarily intertwined and whether they have been met depends on the totality of the circumstances. (*People v. Dominguez*, *supra*, 39 Cal.4th 1141, 1152; *People v. Rayford*, *supra*, at p. 12.)

Here, the evidence shows Courtney grabbed Erika in the middle of the road, carried her approximately 12 feet,³ and threw her into some bushes adjacent to the road. The jury could have reasonably found Courtney's movement of Erika was more than merely incidental to the sexual penetration because Courtney could have completed the

³ The full width of the road is 24 feet and she was in the middle of the road when he grabbed her the second time.

sexual penetration without moving Erika. (*People v. Shadden*, *supra*, 93 Cal.App.4th at p. 169 ["Where a defendant drags a victim to another place, and then attempts a rape, the jury may reasonably infer the movement was neither part of nor necessary to the rape"]; see also, e.g., *People v. Salazar* (1995) 33 Cal.App.4th 341, 348; *People v. Smith*, *supra*, 33 Cal.App.4th at p. 1594.)

Moreover, while Courtney did not move Erika a great distance, the jury could have reasonably found the movement significantly changed Erika's environment. She went from being upright in a place where she was clearly visible to approaching cars and could run more easily with her bare feet to being on her back in a place where she was inferably less visible to approaching cars and could not run as easily. In addition, the jury could have reasonably found the change of environment made a second escape by Erika more difficult and, therefore, more dangerous. The jury also could have reasonably found the change of environment obscured Courtney's actions, which, coupled with the light traffic, decreased the likelihood his crimes would be detected and enhanced his opportunity to commit additional crimes.

Accordingly, we conclude a rational jury could have found beyond a reasonable doubt that Courtney's movement of Erika was not merely incidental to the sexual penetration and increased the risk of harm to her beyond that inherent in the crime.

People v. Stanworth (1974) 11 Cal.3d 588, on which Courtney relies, is distinguishable. In *Stanworth*, the defendant accosted the victim while she was walking along the road. He threatened her with an ice pick and forcibly moved her 25 feet into an open field where he bound, raped and robbed her. (*Id.* at p. 597.) The California

Supreme Court reversed the defendant's conviction for kidnapping for robbery, concluding there was no evidence the movement of the victim removed her from public view or otherwise substantially increased her risk of harm beyond that inherent in the underlying crimes. (*Id.* at p. 598.) Since the *Stanworth* case was decided, the Legislature has amended the aggravated kidnapping statute to require only that the movement of the victim "increase," rather than "substantially increase," the victim's risk of harm. (Pen. Code, § 209, subd. (b)(2); *People v. Dominguez*, *supra*, 39 Cal.4th at p. 1150, fn. 5.) Further, unlike *Stanworth*, there is evidence in this case that Courtney's movement of Erica increased her risk of harm. As we have explained, the evidence shows Courtney moved Erica to an area with inferably rougher terrain and inferably more obscured from public view, making it more dangerous for Erika and more difficult for Courtney's actions to be detected. (Cf. *People v. Dominguez*, *supra*, at p. 1154.) That Yarbrough and Rivera were actually able to see Erika struggling with Courtney is not dispositive because the danger does not need to materialize for the risk of harm to increase. (*People v. Rayford*, *supra*, 9 Cal.4th at p. 14.)

II

The False Imprisonment by Violence Conviction Must Be Reversed Because False Imprisonment by Violence is a Lesser Included Offense of Kidnapping for Sexual Penetration

Courtney contends the trial court should have stricken his conviction for false imprisonment by violence because false imprisonment by violence is a lesser included offense of kidnapping for sexual penetration. We agree.

The Attorney General concedes that false imprisonment is a lesser included offense of kidnapping for sexual penetration when the two charges are based on the same facts. (*People v. Shadden, supra*, 93 Cal.App.4th 164, 171.) However, the Attorney General contends in this case the false imprisonment for violence conviction was based on different facts than the kidnapping for sexual penetration conviction. More particularly, the Attorney General contends the false imprisonment for violence conviction was based solely on Courtney's first act of grabbing Erika. It was not based on the second act of grabbing her, when the sexual penetration occurred. This contention is not supported by the applicable law or the record.

As Courtney points out in his reply brief, false imprisonment requires restraint or confinement of the victim. (*People v. Haney* (1977) 75 Cal.App.3d 308, 313.) "[T]he application of physical force upon a person is insufficient to establish [the person's] seizure or confinement for purposes of . . . false imprisonment if the person successfully resists the force used." (*People v. Martinez* (1984) 150 Cal.App.3d 579, 600 disapproved on another point in *People v. Hayes* (1991) 52 Cal.3d 577, 628, fn. 10.) Because Erika successfully resisted Courtney and never submitted to him the first time he grabbed her, the first act of grabbing is not sufficient to support a false imprisonment conviction.

The prosecutor appears to have recognized this legal constraint because, during the portion of her closing argument related to the false imprisonment charge, the prosecutor did not separate the two acts of grabbing Erika. Instead, she treated the acts collectively, arguing, "And count 4 is false imprisonment. Defendant intentionally restrained Erika by violence. We know that. He held her down. He tried to hold her the first time on the side

of the road. And then when she runs across the street and he chases her down, he is holding her down again. And defendant made Erika stay or go somewhere against her will. Again, Erika did not consent to any of this. And she was fighting to get away. That is false imprisonment."

It is clear both from the prosecutor's closing remarks and the applicable law that the false imprisonment for violence and kidnapping for sexual penetration charges were based on the same facts. Therefore, the false imprisonment for violence conviction, as a lesser included offense of the kidnapping for sexual penetration conviction, must be reversed. (*People v. Medina* (2007) 41 Cal.4th 685, 702; *People v. Pearson* (1986) 42 Cal.3d 351, 355.)

DISPOSITION

The conviction for false imprisonment by violence is reversed. The matter is remanded to the trial court with directions to strike this conviction, amend the abstract of judgment, and forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

McINTYRE, J.

AARON, J.